4-9-2020

Amos Tate v. Schember

DLD-134 UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3026

AMOS TATE,
Appellant

v.

MAYOR SCHEMBER; ERIE POLICE TRAFFIC DIVISION CAPTAIN; ERIE PA SOLICITOR BETZA; OWNERS OF MCMILLAN TOWING

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 1-19-cv-00179)
District Judge: Honorable Susan Paradise Baxter

Submitted for Possible Dismissal Due to a Jurisdictional Defect or
Possible Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
March 5, 2020

Before: RESTREPO, PORTER, and SCIRICA, Circuit Judges

(Opinion filed: April 9, 2020)

OPINION*

PER CURIAM

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Amos Tate appeals from the order of the District Court (1) denying his motion for an injunction, and (2) dismissing his complaint without prejudice. We will affirm the first of those rulings but will dismiss this appeal as to the second.

I.

Tate filed this action pro se against officials of Erie, Pennsylvania, and a tow-truck company. He alleged that defendants violated his due process rights by towing and impounding his inoperable car, which was parked on a city street that was scheduled for repaving. He also filed a motion for a "temporary injunction" in which he asked the District Court to enjoin the auction of his car pending disposition of his complaint.

By order entered August 16, 2019, the District Court granted Tate leave to proceed in forma pauperis but dismissed his complaint for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). The District Court did so without prejudice to Tate's ability to amend his complaint to the extent that he alleged the denial of procedural due process. The District Court also denied Tate's motion for an injunction on the ground that he had not shown a likelihood of success on the merits.

Tate appeals. Our Clerk notified him that we would consider dismissing this appeal for lack of appellate jurisdiction on the ground that the District Court's order of dismissal was not "final" for purposes of 28 U.S.C. § 1291. Our Clerk further notified him that we would consider taking summary action. Tate has not filed a response on either issue.

II.

Tate's notice of appeal does not specify whether he is appealing the District Court's denial of his motion for an injunction, the District Court's dismissal without prejudice of his complaint, or both. In light of Tate's pro se status, we liberally construe his notice of appeal to seek review of both rulings.

A.

We have jurisdiction to review the District Court's denial of Tate's motion for an injunction as the refusal of an injunction under 28 U.S.C. § 1292(a)(1). Our jurisdiction thereunder generally extends to orders denying a preliminary injunction but not to orders denying a temporary restraining order. See Vuitton v. White, 945 F.2d 569, 573 (3d Cir. 1991). Tate called his motion one for a "temporary injunction," and the District Court referred to it as one for a "temporary restraining order." Those labels, however, are not controlling. See Miller v. Mitchell, 598 F.3d 139, 145 (3d Cir. 2010). For purposes of § 1292(a)(1), we conclude that Tate sought a preliminary injunction pending the disposition of his complaint and not the kind of emergency, short-term relief typically sought by way of a temporary restraining order. See Vuitton, 945 F.2d at 573.

Thus, we have jurisdiction to review the District Court's denial of Tate's motion for an injunction. We do so for abuse of discretion, though we review underlying legal questions de novo. See Miller, 598 F.3d at 145. Having conducted that review, we will affirm because we agree that Tate has not shown a likelihood of success on the merits for the reasons that the District Court thoroughly explained in dismissing his complaint (though we lack jurisdiction to review that ruling itself as discussed below and thus express no opinion on the ultimate merits of Tate's claims).

We add that Tate also has not shown that he faces irreparable harm. Tate does not claim that defendants' allegedly threatened auction of his inoperable car would deprive him of anything other than the monetary value of that car. If Tate were to prevail on the merits (an issue on which we express no opinion), then this alleged injury could be redressed by monetary damages. Injuries that can be redressed by monetary damages usually are not irreparable for purposes of injunctive relief, see In re Revel AC, Inc., 802 F.3d 558, 572 (3d Cir. 2015), and Tate has raise nothing suggesting that his alleged injury is any exception.

B.

Our jurisdiction does not extend to the District Court's dismissal of Tate's complaint without prejudice and with leave to amend. Such dismissals generally are not final orders for purposes of § 1291. See Weber v. McGrogan, 939 F.3d 232, 238 (3d Cir. 2019). Under some circumstances, however, a plaintiff can convert such a dismissal into final appealable order by standing on his or her complaint. See id. In several cases, for example, we have exercised jurisdiction on the theory that the plaintiff stood on the complaint when the plaintiff, like Tate, did not amend within the time permitted and instead filed an appeal. See, e.g., Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 n.5 (3d Cir. 1992); Shapiro v. UJB Fin. Corp., 964 F.2d 272, 278-79 (3d Cir. 1992).

This line of authority, however, does not render final the District Court's order of dismissal in this case. Tate filed his notice of appeal from an order that contained two potentially appealable rulings—the denial of his motion for an injunction that we just addressed, and the dismissal without prejudice that we are addressing now. Cf., e.g.,

Batoff, 977 F.2d at 851 n.5 (addressing appeal from an order of dismissal only); Shapiro, 964 F.2d at 278-79 (same). As noted above, however, Tate's notice of appeal does not specify which of these rulings he seeks to challenge. Nor, despite our Clerk's invitations, has Tate filed anything else on appeal that might have clarified his intent in that regard. Cf. Hagan v. Rogers, 570 F.3d 146, 151-52 (3d Cir. 2009) (looking to appellant's filings on appeal); Frederico v. Home Depot, 507 F.3d 188, 192-93 (3d Cir. 2007) (same).[1] Thus, under these circumstances, Tate's mere filing of this appeal does not evince a clear intention to stand on his complaint.

Nor has the District Court's order of dismissal become final by its own terms. An order dismissing a complaint without prejudice can become final if the District Court makes the order self-effectuating by providing that it will ripen into a dismissal with prejudice if the plaintiff does not amend within the time permitted. See Weber, 939 F.3d at 240-41 (discussing Berke v. Bloch, 242 F.3d 131, 134-36 (3d Cir. 2001)). In this case, however, the District Court expressly declined to make its order self-effectuating. To the contrary, its order provides that, "[i]n the event Plaintiff fails to replead his procedural due process claim on or before September 13, 2019, the Court will enter an order converting the dismissal of said claim to a dismissal with prejudice, without further

[1] Tate's notice of appeal contains assertions that conceivably could be directed to either of the District Court's rulings. Those assertions include Tate's assertion that the District Judge should be "removed" and "expelled" from the bench. In that regard, we decline to construe Tate's notice of appeal as a mandamus petition seeking disqualification of the District Judge because Tate has not asserted any grounds for disqualification and our review reveals none.

notice, and the case will be closed." (ECF No. 14 at 15) (first and third emphases added). Thus, the District Court's order expressly provides that proceedings in the District Court will not be concluded until the District Court enters an additional order dismissing Tate's complaint with prejudice, which the District Court has not yet done.[2]

In sum, because we cannot conclude that Tate is standing on his complaint and because the District Court's order of dismissal is not otherwise immediately appealable by its own terms, we lack jurisdiction to review that order under § 1291.

III.

For these reasons, we will affirm the District Court's order denying Tate's motion for an injunction but will dismiss this appeal to the extent that Tate challenges the District Court's order dismissing his complaint without prejudice.

[2] The District Court's decision not to enter a self-effectuating order, by itself, would not prevent us from exercising jurisdiction if Tate had clearly stood on his complaint. See Shapiro, 964 F.2d at 278 (exercising jurisdiction despite District Court's statement that it would "entertain a renewed motion to dismiss" if the plaintiffs did not amend their complaint). As explained above, however, Tate has not done so.